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Investigative Deceit

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Is it ever ethical for a lawyer to ask or assist another person to lie on behalf of a client? Despite ethical rules categorically banning both personal and vicarious deceit, prosecutors routinely supervise police officers and informants who use deceit in investigating drug and sex offenses, organized crime, and terrorism. May defense lawyers make use of investigative deceit in criminal investigations? In this Essay, the Author examines this issue, the ethical rules bearing on it, and the recent trend in a number of jurisdictions allowing the use of investigative deceit by the defense. Drawing on his participation in a series of roundtable discussions sponsored by the Criminal Justice Section of the American Bar Association, the Author canvasses the various arguments that are marshaled both for and against allowing criminal defense lawyers to use investigative deceit.

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INTRODUCTION

Philosophers and ethicists have long disagreed about the permissibility of lying.[1] On one side of this divide are those such as Saint Augustine and Immanuel Kant who articulate a clear and categorical prohibition on lying.[2] On the other side of the philosophical divide are those who reject a categorical approach in favor of a more nuanced view—that lies, at some times and under some circumstances, are justifiable.[3] A similar debate is now taking place among lawyers and judges who work in the criminal justice system about the appropriateness of prosecutors and defense lawyers assisting and supervising lies and other forms of deceit in investigating criminal cases.

Is it ever ethical for a lawyer to ask or assist another to lie on behalf of a client? During the past year, I have asked many lawyers and judges

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1. For a discussion of the general topic of lying and other forms of deceit, see SISSELA BOK, LYING: MORAL CHOICE IN PUBLIC AND PRIVATE LIFE (1979).

2. *See id.* at 34.

3. *See id.* at 30 ("While we know the risks of lying, and would prefer a world where others abstained from it, we know also that there are times when it would be helpful, perhaps even necessary, if we ourselves could deceive with impunity.").

this question in a series of discussion forums around the United States on proposed changes to the American Bar Association's Criminal Justice Standards. When one asks lawyers and judges whether it is ethical for a lawyer to ask or assist another to lie on behalf of a client, my experience has been that the most likely initial answer is a categorical, almost reflexive, "no," which seems to echo Augustine and Kant. Further discussion and reflection, though, tends to reveal a range of more nuanced views about investigative deceit, especially in criminal practice. The recognition that prosecutors regularly supervise police and informants who engage in deceit makes many lawyers uncomfortable with a categorical prohibition.

The ABA Model Rules of Professional Conduct as well as state legal ethics codes across the United States modeled on these Model Rules have long set forth categorical prohibitions of false statements and other forms of deceit.[4] But a growing number of jurisdictions have concluded that such categorical prohibitions should yield to the needs and customs of criminal law enforcement and criminal defense practice, and have authorized the use of investigative deceit. A wide range of both moral and practical concerns appears to have driven this trend of reexamining and modifying categorical bans on deceit.

Part I of this Essay sets out the existing provisions of the Model Rules that are most relevant to the use of investigative deceit. Part II describes how a number of jurisdictions have recently modified their stances and taken a variety of approaches in permitting such deceit. Part III canvasses various arguments for and against abandoning the categorical view.

I. THE ISSUE

In exploring various rules and arguments about investigative deceit, it will be helpful at various points in this Essay to have some concrete factual scenarios to which to refer. Consider the following two scenarios.

> *Scenario A*: Lawyer A's client is charged with possessing child pornography on his work computer and forcing a twelve-year-old Complainant to view the pornography. Client A and Complainant A were acquainted through a mentoring program, and Complainant A often spent time at Client A's place of work. Complainant A knew Client A's computer password and offered to show the investigating officer the location of the pornographic images.
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> Lawyer A learns that Complainant A has a history of both false sexual allegations and of accessing pornography on the Internet.

4. *See, e.g.*, MODEL CODE OF PROF'L RESPONSIBILITY DR 1-102(A)(4), DR 7-102(A)(5) (1969); STEPHEN GILLERS ET AL., REGULATION OF LAWYERS: STATUTES AND STANDARDS 305–306, 498–505 (2010 ed. 2010) (discussing state adoptions and variations of Model Rule 4.1(A) and Model Rule 8.4(C)).

Lawyer A strongly suspects Complainant A, rather than his client, accessed and placed the pornography on Client A's computer. Lawyer A wants to inspect Complainant A's home computer for similar pornography, which would help exculpate Client A by supporting the inference that Complainant A rather than Client A was responsible for the pornography on Client A's computer. Lawyer A is afraid, however, that if he openly asks Complainant A to do so, then he will destroy any pornographic images on his computer.

Lawyer A wants to hire a private investigator to gain access to Complainant A's computer through deception. The private investigator would pose as a computer consultant conducting a survey of computer use by young people. He would contact Complainant A and his family and offer to swap Complainant A's computer for a new laptop computer that would purportedly allow the consultant to monitor Complainant A's computer use. Once the private investigator obtains Complainant A's computer, Lawyer A plans to have an expert examine the computer for pornography.

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Scenario B: Lawyer B's client is charged with sexual assault based on allegations that he had sexual intercourse with a young woman without her consent. Both Client B and Complainant B are students at a large university who knew one another well prior to the alleged rape. The charged crime is alleged to have taken place in Client B's bedroom at a fraternity on the night of a party following a football game. Client B admits the intercourse took place but claims that Complainant B consented. Complainant B has told police that she did not consent and that Client B had intercourse with her when she was unconscious, having passed out after admittedly drinking too heavily at the party.

Lawyer B interviews a mutual acquaintance of both Client B and Complainant B, who tells her that Client B and Complainant B were dating for the six months prior to the alleged rape and that their relationship had become turbulent in the weeks just prior to the incident. Client B was upset that Complainant B was considering breaking off their relationship and accepting a job after graduation in a distant city. The friend tells Lawyer B that Complainant B tends to be a very moderate drinker. The friend also says that Complainant B, as well as many of her friends who were at the party in question, have been discussing both the alleged rape and Complainant B's relationship with Client B extensively on Complainant B's Facebook page.

Lawyer B wants to hire a private investigator to gain access to Complainant B's Facebook page through deception. The private investigator, a forty-five-year-old former police officer, maintains two Facebook pages under assumed names. On one of these pages, he presents himself as a twenty-one-year-old male university student and, on the other, as a nineteen-year-old female university student. Both pages use photos that are not of the investigator, but of attractive young people. The investigator, using one or both of his undercover Facebook personas, would attempt to have Complainant B "friend" him to allow him access to her page. He

> would examine the page for any useful exculpatory or impeachment material. He would also attempt to engage Complainant B in conversation, seeking to obtain exculpatory and impeachment material.

Lawyers A and B come to you for advice. Are their investigative plans ethically permissible under the Model Rules of Professional Conduct?

Several Model Rules bear on the use of deceit in investigations and interact to create potential ethical liability for both Lawyer A and Lawyer B. Among them, Rules 5.3 and 8.4(a) deal with the responsibility of lawyers regarding the acts of nonlawyers.[5] Rules 4.1 and 8.4(c), on the other hand, directly address false statements and other forms of deceit.[6]

Lawyers do, at times, choose to conduct their own undercover factual investigations.[7] But for a number of reasons, they typically leave such work to other people, usually nonlawyers. A lawyer may lack the skills needed for effective investigation or simply fear the physical risks it might entail in the criminal context. A lawyer might be concerned that, because of her role as counsel, she is likely to be recognized by those being investigated. The advocate-witness rule also discourages a lawyer from personally engaging in such factual investigation. If the lawyer becomes a key witness by participating in an investigation, the lawyer may well be disqualified from participating in the case as counsel.[8]

A. Responsibility for the Acts of Others

Model Rules 5.3 and 8.4(a) can create ethical liability for lawyers related to the acts of nonlawyers. Both rules apply to conduct by a nonlawyer that is inconsistent with the professional obligations of a lawyer.[9]

Rule 5.3, entitled "Responsibilities Regarding Nonlawyer Assistants," imposes both obligations and responsibilities on lawyers "[w]ith respect to a nonlawyer *employed* or *retained by* or *associated with* a lawyer."[10] A lawyer hiring someone to conduct an investigation of the sort described in Scenarios A and B above could trigger two separate sections of Rule 5.3. Subsection (b) requires a lawyer supervising a nonlawyer to "make reasonable efforts to ensure" that the nonlawyer's "conduct is compatible with the professional obligations of the lawyer."[11] Under Rule 5.3(b), a lawyer who employs an investigator who engages in deceit

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5. Model Rules of Prof'l Conduct R. 5.3, 8.4(a) (2010).

6. *Id.* R. 4.1, 8.4(c).

7. *See, e.g.*, *In re* Gatti, 8 P.3d 966, 969 (Or. 2000).

8. *See* Model Rules of Prof'l Conduct R. 3.7(a) (2010) ("A lawyer shall not act as advocate at a trial in which the lawyer is likely to be a necessary witness . . . .").

9. *See* Model Rules of Prof'l Conduct R. 5.3, 8.4(a) (2010).

10. *Id.* R. 5.3 (emphasis added).

11. *Id.* R. 5.3(b).

might be sanctioned for the lawyer's own failure to make a reasonable effort to prevent the investigator from using deceit.[12] Ethical liability under Rule 5.3(b), while clearly related to the nonlawyer's use of deceit, is not truly vicarious, since it is based on the lawyer's own omission.

Subsection (c) of Rule 5.3, in contrast to subsection (b), imposes ethical liability for a lawyer's acts rather than omissions. It states that the lawyer "shall be responsible" for conduct by a nonlawyer assistant if the lawyer "*orders*" or "*ratifies*" the conduct.[13] Subsection (c) makes the lawyer responsible for the investigator's conduct and, thus, imposes true vicarious liability.[14]

Rule 8.4(a) also creates potential ethical liability for a lawyer who hires an investigator who uses deceit. Rule 8.4(a) states: "It is professional misconduct for a lawyer to: (a) violate or attempt to violate the Rules of Professional Conduct, knowingly *assist or induce another* to do so, or do so *through the acts of another*...."[15] As with Rule 5.3, Rule 8.4(a) creates two different paths to liability. First, the lawyer might be sanctioned for assisting or inducing the investigative deceit, with liability roughly equivalent to criminal law accomplice liability. Second, the lawyer might be sanctioned for violating ethical rules about deceit "through the acts of another."

In sum, Rules 5.3 and 8.4(a) together create four possible avenues for ethics authorities to sanction Lawyers A and B in the fact patterns above: (1) failing to stop the deceit, (2) ordering or ratifying the deceit, (3) assisting or inducing the deceit, and (4) engaging in deceit "through the acts of another." Defense attorneys, such as Lawyers A and B, who use nonlawyers to conduct undercover investigations, open themselves to each avenue of liability. An investigator hired by a defense lawyer easily falls within Rule 5.3's broad language of being "employed or retained by or associated with" the defense lawyer.[16] Such a lawyer fails to take measures to stop the deceit, fulfilling Rule 5.3(b), and also orders and ratifies the deceit, fulfilling Rule 5.3(c). Such a lawyer also knowingly assists and induces the investigator, as required by Rule 8.4(a), by providing information and payment. For the same reason, the lawyer can easily be said to be violating prohibitions on deceit through the acts of another.

The prosecutor's relationship with police or informants who engage in deceit does not fall quite so easily within all of these provisions as does the relationship between a private lawyer and a private investigator. Nonetheless, the language in both Rules 5.3 and 8.4(a) is broad enough

12. *See id.*
13. *Id.* R. 5.3(c) (emphasis added).
14. *See id.*
15. *Id.* R. 8.4(a) (emphasis added).
16. *Id.* R. 5.3.

to make prosecutors ethically liable for investigative deceit by police and informants. Police officers who operate undercover, for example, are not "employed or retained" by prosecutors.[17] They are employed by the police department, not the district attorney's office. But police and informants used by police and prosecutors can easily be said to be "associated" with the prosecutor, thus triggering liability under Rule 5.3.[18]

B. Lying and Deceit

In order to trigger lawyer liability under Rules 5.3 and 8.4(a), the conduct of an investigator must be such that it would violate ethical rules "if engaged in by a lawyer."[19] What do the Model Rules say, then, about lies and other forms of deceit?

Two key Model Rules directly address lying and deceit. Rule 4.1 states, "In the course of representing a client a lawyer shall not knowingly: (a) make a false statement of material fact or law to a third person . . . ."[20] Comment 2 to Rule 4.1 employs a definitional sleight-of-hand to exempt some types of false statements typically made in the context of negotiations, such as estimates of price or value, from Rule 4.1(a)'s prohibition.[21] The comments to Rule 4.1 currently contain no similar exemption for false statements made during criminal investigations, whether by prosecution or by defense.

Undercover investigations routinely involve the making of material false statements of fact. Investigators going "undercover" and informants cooperating with the police make false statements of fact about their identities and purposes. In order to establish credibility, investigators and informants may also make false statements with respect to such things as their prior criminal history and connections with criminals. In Scenario A above, for example, the investigator would make false statements about who he is, his work and employer, and the reason he wants to swap a new laptop for Complainant A's computer. If asked, he would also make a false statement about what will happen to the Complainant's computer during the swap and where it will be kept. In Scenario B, the investigator going on Facebook to investigate the rape allegations will make false

17. *See id.* ("With respect to a nonlawyer employed or retained by or associated with a lawyer . . . .").

18. *See id.*

19. *Id.* R. 5.3(c).

20. *Id.* R. 4.1(a).

21. *Id.* cmt. 2 ("This Rule refers to statements of fact. Whether a particular statement should be regarded as one of fact can depend on the circumstances. Under generally accepted conventions in negotiation, certain types of statements ordinarily are not taken as statements of material fact. Estimates of price or value placed on the subject of a transaction and a party's intentions as to an acceptable settlement of a claim are ordinarily in this category, and so is the existence of an undisclosed principal except where nondisclosure of the principal would constitute fraud.").

statements about his name, age, gender, occupation, physical description, and any other information needed to create the Facebook page of his undercover persona. He will also make additional false statements, if necessary, to have Complainant B grant him access to her Facebook page.

The other key rule addressing deceit is Rule 8.4(c), which provides that "[i]t is professional misconduct for a lawyer to . . . engage in conduct involving dishonesty, fraud, deceit or misrepresentation . . . ."[22] This provision is broader than Rule 4.1(a)'s prohibition of false statements. It bans false statements and a great deal more. For the reasons pointed out above,[23] undercover investigations often involve "dishonesty," "deceit" and, "misrepresentation."

The language of Rules 4.1(a) and 8.4(c) clearly bars the sorts of statements and other conduct engaged in by private defense investigators, police, and informants during undercover investigations if they were "engaged in by a lawyer." Rules 5.3 and 8.4(a) make lawyers ethically liable for such statements made by nonlawyers employed, retained, or associated with them.[24] These rules on their face thus dictate ethical liability for the lawyers in Scenarios A and B. The language of these rules also dictates ethical liability for prosecutors associated with police and informants who make similar false statements and engage in similar undercover deceit.

What should we make of the fact that these categorical rules were adopted at a time when it was widely recognized that prosecutors regularly supervise police and informants who engage in undercover deceit in pursuing investigations? Were these rules meant to curb prosecutorial participation in and acceptance of such undercover investigative techniques? Did the Model Rules' drafters intend to exempt prosecutors despite not recording such an exemption within the text or comments of the applicable ethical rules? Or did it just not occur to them that prosecutorial involvement in undercover investigations was implicated by these Rules? We will return to these questions below.

II. CURRENT APPROACHES

A number of jurisdictions have modified their ethics rules to allow lawyers to utilize deceptive investigations. The substance of these modifications varies from state to state. Some exempt only government lawyers from the deceit rules when they are pursuing undercover investigations, which I refer to below as an "asymmetrical" approach. Others exempt *both* prosecutors and defense counsel, which I refer to as

22. MODEL RULES OF PROF'L CONDUCT R. 8.4(c) (2010).

23. *See* discussion *supra* Part I.B.

24. *See* discussion *supra* Part I.A.

a "symmetrical" approach. Some states allow lawyers personally to engage in deceit, which I refer to as "personal" deceit. More commonly, though, jurisdictions maintain a ban on personal deceit by lawyers, while allowing lawyers to participate in investigations in which someone else, such as a police officer or private investigator, does the deceiving. I refer to this approach as permitting "vicarious" deception.

States that allow investigative deceit have accomplished this result through a variety of means. Some have chosen to amend the text of their ethical rules in a variety of ways, such as allowing investigative deceit through amendment of a comment to their ethical rules. Still other jurisdictions have created an investigative deceit exception through the interpretation of existing rules by a court or an ethics committee.

A. The Asymmetrical Approach

A few jurisdictions have created exemptions from their versions of the Model Rules for prosecutors. In these jurisdictions, neither Lawyer A nor Lawyer B, as defense lawyers, would be permitted to use the investigative techniques proposed above.

Florida amended its analog to Model Rule 8.4(c) to include the following: "[I]t shall not be professional misconduct for a lawyer for a criminal law enforcement agency or regulatory agency to advise others about or to supervise another in an undercover investigation . . . ."[25] The comment to this language makes clear that it exempts government lawyers from both the deceit provisions of Rule 8.3 as well as the false statement provision of Rule 4.1:

> Subdivision (c) recognizes instances where lawyers in criminal law enforcement agencies or regulatory agencies advise others about or supervise others in undercover investigations, and provides an exception to allow the activity without the lawyer engaging in professional misconduct. The exception acknowledges current, acceptable practice of these agencies. Although the exception appears in this rule, it is also applicable to rules 4-4.1 and 4-4.3.[26]

This language in the Florida version of Rule 8.4(c) adopts an asymmetrical approach that allows vicarious deception by government lawyers. The Rule avoids explicitly stating that these investigations involve false statements and deceit, choosing to imply such falsity and deceit by use of the word "undercover." Florida's Rule 8.4 also has an unusual and narrowly crafted exemption, which allows personal deceit by a lawyer who is working for the government as an investigative agent rather than as a lawyer.[27]

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25. Fla. Rules of Prof'l Conduct R. 4-8.4(c) (2010).

26. *Id.* cmt.

27. *Id.* R. 4-8.4(c) ("[I]t shall not be professional misconduct for a lawyer employed in a capacity other than as a lawyer by a criminal law enforcement agency or regulatory agency to participate in an

Alabama has taken a different path to creating an asymmetrical vicarious deceit exemption for government lawyers. Rather than modifying the rules that directly deal with false statement and deceit, its versions of Rules 4.1 and 8.4(c), Alabama chose to modify its version of Rule 3.8, entitled "Special Responsibilities of a Prosecutor." The relevant language of Alabama's Rule 3.8(2) states:

> (a) Notwithstanding Rules 5.3 and 8.4, the prosecutor, through orders, directions, advice and encouragement, may cause other agencies and offices of government, and may cause non-lawyers employed or retained by or associated with the prosecutor, to engage in *any action that is not prohibited by law* . . . ; and
>
> (b) To the extent an action of the government is not prohibited by law but would violate these Rules *if done by a lawyer*, the prosecutor (1) *may have limited participation* in the action, as provided in (2)(a) above, but (2) *shall not personally act in violation* of these Rules.[28]

The Alabama drafters were more circumspect than Florida's about approving participation in undercover investigations. The phrase "any action that is not prohibited by law" in 3.8(2)(a) could cover a whole host of things. The phrase "shall not personally act in violation" in 3.8(2)(b) appears to exempt only vicarious deception, and the language "may have limited participation" sets an undefined limit on prosecutorial involvement in vicarious deception.

The comment to the Alabama Rules of Professional Conduct is much more forthcoming. It specifically states:

> in *undercover and sting operations*, the making of false statements is the essence of the activity. The prosecutor is prohibited by Rule 4.1(a) from making false statements and is prohibited by Rule 8.4(a) from knowingly assisting or inducing another to violate the Rules. . . . [P]aragraph (2)(a) makes clear that the prosecutor *may order, direct, encourage and advise* with respect to any lawful governmental action. However, where lawyers generally are prohibited by the Rules from taking an action, *the prosecutor is* likewise *prohibited from personally violating the Rules*. In such situations, the prosecutor's actions, as distinct from those of other governmental entities, are limited so as to preserve the integrity of the profession of law.[29]

Thus, Alabama's investigative deceit exemption is both asymmetrical and vicarious, like Florida's. But Alabama's is also narrower than Florida's in that it exempts only prosecutors, not all government lawyers.[30]

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undercover investigation . . . .").

28. ALA. RULES OF PROF'L CONDUCT R. 3.8(2) (2009) (emphasis added).

29. *Id.* cmt. (emphasis added).

30. *Id.* ("Paragraph (2) is applicable *only to lawyers acting as prosecutors*. It is designed to accommodate the prosecutor's special responsibility in governmental law-enforcement activities and is not applicable otherwise." (emphasis added)).

Utah also has an investigative deceit exemption for government lawyers. But unlike Florida and Alabama, Utah created this exemption through an ethics opinion interpreting Utah's version of Rule 8.4(c).[31] A Utah bar member "who works for a federal agency that routinely performs undercover investigative work and covert actions directed against criminal and terrorist groups" asked whether his supervision or participation in such activities violated Utah's version of Rule 8.4(c).[32] The committee that wrote the opinion acknowledged that the text of Rule 8.4(c) appears to ban government lawyers from participating personally or vicariously in investigative deceit.[33] Relying on the comment to 8.4(c), however, the ethics opinion concluded that the drafters of Rule 8.4(c) did not intend to ban the use of investigative deceit by government lawyers.[34] The committee specifically reserved the question of whether "the analysis and result of this opinion apply to a private lawyer's investigative conduct that involves dishonesty, fraud, misrepresentation or deceit."[35]

Finally, in jurisdictions that have not dealt specifically with the subject either through rule amendment or interpretation, despite the categorical bans on misrepresentation and deceit that exist in virtually every jurisdiction, prosecutors are not, in fact, disciplined on the basis of vicarious ethical responsibility for the misrepresentations and deceit of police and informants whom they advise and supervise. Prosecutors in these jurisdictions thus have a de facto exemption to supervise investigative deceit.

B. The Symmetrical Approach

A number of jurisdictions now allow both prosecutors and private lawyers to participate in vicarious investigative deceit.[36] In all of these jurisdictions, Lawyer A and Lawyer B in the scenarios described above would be allowed to pursue their proposed investigations.

As with the asymmetrical approach described above, some jurisdictions have accomplished this by amending the text of and comments to their ethics rules. States that have amended their ethics rules and comments have taken different textual routes to such amendments.

Some states have adopted language explicitly permitting lawyers to supervise covert investigations. Oregon's version of Rule 8.4 is

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31. Utah State Bar Ethics Advisory Op. Comm., Op. 02-05 (Mar. 18, 2002).

32. *Id.* at ¶ 3.

33. *Id.* at ¶ 4.

34. *See id.* at ¶ 10.

35. *Id.* at ¶ 2 n.1.

36. *See, e.g.*, Ohio Rules of Prof'l Conduct R. 8.4 cmt. 2A (2011); Or. Rules of Prof'l Conduct R. 8.4(b) (2010); Wis. Rules of Prof'l Conduct for Attorneys SCR 20:4.1 (2010).

symmetrical but limited to exempting vicarious investigative deceit. It states:

> [I]t shall not be professional misconduct for a lawyer to advise clients or others about or to supervise lawful covert activity in the investigation of violations of civil or criminal law or constitutional rights, provided the lawyer's conduct is otherwise in compliance with these Rules of Professional Conduct.[37]

Rather than relying on the word "covert" to imply that false statements and deceit are allowed, the Oregon Rule goes on to state forthrightly: "'Covert activity,' as used in this rule, means an effort to obtain information on unlawful activity through the use of misrepresentations or other subterfuge."[38] Oregon Rule 8.4(b), though, places a limit on its investigative deceit exemption by adding a sort of "probable cause" requirement, requiring that the lawyer, prior to using deceit, have a good faith belief in the existence of the unlawful activity the covert investigation is aimed at revealing.[39]

Ohio also adopted a symmetrical and vicarious exemption, using language similar to Oregon's version of Rule 8.4(b). But Ohio did so by adding the language to its comment to Rule 8.4(c), rather than by amending the language of the Rule. The Ohio comment explains that the Rule "does not prohibit a lawyer from supervising or advising about lawful covert activity in the investigation of criminal activity or violations of constitutional or civil rights when authorized by law."[40] While clearly allowing both government and private lawyers to engage in vicarious investigative deceit, Ohio is not as forthright as Oregon in acknowledging that "covert activity" entails lies and deceit.

Wisconsin has also adopted a symmetrical exemption for investigative deceit. Rather than amending the text of or comment to its Rule 8.4(c), though, Wisconsin amended its version of Rule 4.1 by adding a new subsection (b). The subsection reads: "Notwithstanding par[agraph] (a) and [Rules 5.3(c)(1) and 8.4], a lawyer may advise or supervise others with respect to lawful investigative activities."[41] The Wisconsin amendment to its Rule 4.1 is more circumspect in its approval of investigative deceit than is the Oregon amendment to its Rule 8.4(b), which explicitly approves covert activity and openly acknowledges that such activity involves lies and deceit.[42] Wisconsin relies on the phrase "lawful investigative activity" to imply investigative deceit.

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37. OR. RULES OF PROF'L CONDUCT R. 8.4(b) (2010).

38. *Id.*

39. *See id.* ("'Covert activity' may be commenced by a lawyer or involve a lawyer as an advisor or supervisor only when the lawyer in good faith believes there is a reasonable possibility that unlawful activity has taken place, is taking place or will take place in the foreseeable future.").

40. OHIO RULES OF PROF'L CONDUCT R. 8.4 cmt. 2A (2011).

41. WIS. RULES OF PROF'L CONDUCT FOR ATTORNEYS SCR 20:4.1 (2010).

42. *See supra* notes 37–38 and accompanying text.

The comment to the Wisconsin amendment is more forthright about its approval of deception. It states:

> [A] lawyer may advise a client concerning whether proposed conduct is lawful. . . . This is allowed even in circumstances in which the conduct *involves some form of deception*, for example the use of testers to investigate unlawful discrimination or the use of undercover detectives to investigate theft in the workplace. . . . Paragraph (b) recognizes that, where the law expressly permits it, lawyers may have limited involvement in certain investigative activities *involving deception*.[43]

Wisconsin, like Oregon, adds a good faith limitation to its investigative deceit exemption.[44]

The backstory to Wisconsin's adoption of an investigative deceit exemption is particularly interesting. Prior to the amendment of its Rule 4.1, but while the amendment was under consideration, Wisconsin ethics authorities dealt with a case involving a criminal defense lawyer's use of vicarious investigative deceit. *Office of Lawyer Regulation v. Hurley* dealt with discipline of a lawyer who, in facts similar to those in Scenario A, hired an investigator to use deception to obtain the complaining witness's computer.[45] After doing so, a forensic computer expert found pornography on the complainant's computer, as the lawyer expected.[46] Soon after the deceptive investigation was revealed, disciplinary charges were brought against the lawyer.[47]

In *Hurley*, a referee assigned to make a report and recommendation found the lawyer's use of investigative deceit did not violate either Rule 4.1 or Rule 8.4(c).[48] She also found that his conduct was justified by his constitutional obligation to provide effective assistance of counsel.[49] The Wisconsin Supreme Court later adopted the referee's reasoning.[50]

C. Continuing Ambiguity

Virginia has taken a different textual route to allowing lawyers to participate in deceit during investigations. Rather than directly addressing either "covert investigations" or "investigative activities," as Oregon and Wisconsin did in amending their versions of Rule 8.4(c), Virginia modified its version of Rule 8.4(c) by restricting that Rule's

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43. Wis. Rules of Prof'l Conduct for Attorneys SCR 20:4.1 cmt. (2010) (emphasis added).

44. *Id.* ("Lawful investigative activity may involve a lawyer as an advisor or supervisor *only when the lawyer in good faith believes there is a reasonable possibility* that unlawful activity has taken place, is taking place or will take place in the foreseeable future." (emphasis added)).

45. No. 07 AP 478-D, 2008 Wisc. LEXIS 1181, at *8–11 (Wis. Feb. 5, 2008).

46. *Id.* at *11.

47. *Id.* at *12.

48. *Id.* at *17, *26.

49. *Id.* at *33–38.

50. Letter from Supreme Court of Wisconsin to the Office of Lawyer Regulation 1 (Feb. 11, 2009) (on file with the Hastings Law Journal) ("We conclude that the referee's findings of fact are not clearly erroneous, and we also uphold the referee's conclusions of law . . . .").

prohibition to include only dishonesty, fraud, deceit, or misrepresentation that "reflects adversely on the lawyer's fitness to practice law."[51] In short, Virginia took language commonly used in Rule 8.4(b)[52] to restrict the types of criminal conduct for which a lawyer may be disciplined, then modified and grafted it onto Rule 8.4(c) to restrict the types of deceit for which a lawyer may be disciplined.

The Virginia amendment to Rule 8.4(c) is not nearly as clear as the language used by Oregon, Ohio, and Wisconsin in permitting investigative deceit. It appears broader, since its language is not limited to the use of misrepresentation and deceit in the context of investigations, and it does not explicitly limit permissible conduct to vicarious deceit.[53] Rather, its language seems to allow lawyers themselves to engage in acts of misrepresentation and deceit in order to obtain exculpating, impeaching, or mitigating evidence or information.

Does Virginia Rule 8.4(c) create a symmetrical or an asymmetrical exception? The text of the current rule fails to distinguish between government and private lawyers, suggesting that it operates symmetrically. But a Virginia ethics opinion written shortly after Virginia amended its Rule 8.4(c) creates doubt about this question. A Virginia attorney asked a Virginia ethics committee "[w]hether an attorney working for a federal intelligence agency can perform undercover work without violating Rule 8.4."[54] The committee's opinion states:

> [T]he committee agrees with the requester that intelligence and covert activities of attorneys *working for the federal government* are an appropriate exception under the new language of Rule 8.4(c), with its additional language limiting prohibition only to such conduct that "reflects adversely on the lawyer's fitness to practice law." Accordingly, the committee opines that when an attorney *employed by the federal government* uses lawful methods, such as the use of "alias identities" and non-consensual tape recording, as part of his intelligence or covert activities, those methods cannot be seen as reflecting adversely on his fitness to practice law; therefore, such conduct will not violate the prohibition in Rule 8.4(c).[55]

This passage indicates fairly clearly that personal as well as investigative deceit is permissible for a lawyer. However, the italicized language suggests that the exemption is limited to government lawyers, although the opinion does not explicitly set such a limit.

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51. VA. RULES OF PROF'L CONDUCT R. 8.4(c) (2009) ("It is professional misconduct for a lawyer to: . . . (c) engage in conduct involving dishonesty, fraud, deceit or misrepresentation which reflects adversely on the lawyer's fitness to practice law.").

52. *See, e.g.*, MODEL RULES OF PROF'L CONDUCT R. 8.4(b) (2010) ("It is professional misconduct for a lawyer to: . . . (b) commit a criminal act *that reflects adversely on the lawyer's honesty, trustworthiness or fitness as a lawyer in other respects . . . .*" (emphasis added)).

53. *See* VA. RULES OF PROF'L CONDUCT R. 8.4(c) (2009).

54. Va. State Bar Council to Review Legal Ethics, Op. 1765 (June 13, 2003).

55. *Id.* (emphasis added).

Another area of uncertainty is how state ethics committees and courts will interpret ethics rules in the many jurisdictions that still have unamended versions of Rules 4.1 and 8.4(c) setting forth unqualified bans on false statements and deceit. Ethics committees and courts in these states may adopt an intentionalist approach in interpreting those rules and ignore their plain language. It will be difficult for lawyers to predict how state ethics authorities and courts will interpret such ethics rules.

Even in jurisdictions that have explicitly approved investigative deceit, there is ambiguity. For example, Florida explicitly modified its version of Rule 8.4(c) to allow government lawyers to supervise undercover investigations.[56] Does the fact that the Rule mentions only government lawyers mean that defense lawyers cannot supervise such investigations? New York Ethics Opinion 737 approves limited deceit in the investigation of "civil rights or intellectual property" cases but is silent on criminal cases.[57]

III. THE ARGUMENTS

A range of arguments can be advanced both for and against allowing lawyers to employ deceit in covert investigations.

A. UTILITY

Legal and ethical prohibitions as well as moral condemnation of deceit are based in part on the harms deceit tends to cause both to individuals and society.[58] The enticement of investigative deception, though, lies largely in its potential benefits to both society and to individuals by uncovering truth and falsity. An undercover agent or informant who lies about her identity and purposes, for example, may learn the true identities, future plans, and past misdeeds of members of an organization involved in drug dealing, sex trafficking, or terrorism. A police sting operation may uncover and help remedy corruption and lies by public officials. The truth such deception brings forth helps to ensure that the blameworthy are punished and the dangerous are deterred and incapacitated.

Misrepresentation and deceit by both defense investigators and police are motivated by the same laudable goal of ultimately producing some greater truth about guilt or innocence and improving the quality of proof used to support a criminal charge. In Scenario A, above, evidence of the presence of pornography on Complainant A's computer would help the jury determine the truth about Client A's conduct and

56. FLA. RULES OF PROF'L CONDUCT R. 4-8.4(c) (2002).

57. New York Cnty. Lawyers' Ass'n Comm. on Prof'l Ethics, Formal Op. 737 (May 23, 2007).

58. *See, e.g.*, BOK, *supra* note 1, at 18–31.

Complainant A's allegations. In Scenario B, the defense investigator's Facebook ruse may uncover additional witnesses or reveal misconduct or untruthfulness on the part of Complainant B or other prosecution witnesses that would persuade the prosecutor to drop or reduce the charges or to impeach the witnesses at trial.

B. NECESSITY

Investigative deception, in addition to being useful, is also often necessary in dealing with crimes and criminals. Prosecutors and police often need to use deceit to find the truth, because criminal activity tends to be clandestine. Crimes, by their very nature, are usually committed covertly, since detection leads not only to possible prosecution and punishment, but also to social condemnation. In addition to having a motive to lie, those who commit crimes are often seen as having a poor character for veracity, a view reflected in our evidentiary rules regarding impeachment.[59] Many witnesses to crimes, such as drug distribution and organized crime, are likely to have powerful motivations to lie out of fear of implication or retaliation. Again, deception is often necessary to get such people to reveal the truth.

As with arguments based on utility, defense counsel can make the same argument as police and prosecutors about the need for deceit in investigating criminal cases. Like prosecutors and police, defense lawyers and their investigators must investigate clandestine activity and deal with people likely to lie.

C. FAIRNESS

As we have seen, the language of the bans on misrepresentation and deceit found in Rule 4.1(a) and 8.4(c) is unqualified.[60] This language covers prosecutors as well as defense lawyers and lawyers in civil practice.[61] Nonetheless, prosecutors, without negative ethical consequences or even much criticism, regularly supervise and advise police in the use of covert investigations that employ misrepresentation and deceit. Such tactics are used to investigate a wide range of crimes, a tendency that both the "war on drugs" and the "war on terror" have reinforced. One might then argue that simple fairness dictates that defense lawyers be treated the same as prosecutors and allowed to use investigative deception without fear of ethical sanction, especially in light of their constitutional obligation to provide effective representation.[62]

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59. *See, e.g.*, FED. R. Evid. 609 (allowing impeachment of a witness on the basis of a prior criminal conviction).

60. *See* discussion *supra* Part I.B.

61. *See* discussion *supra* Part I.B.

62. U.S. CONST. amend. VI.

A possible response to the preceding argument in favor of what I have called symmetry in permitting investigative deceit is that prosecutors should be exempted because they have the burden of proving criminal offenses and must meet the demanding "beyond a reasonable doubt" standard of proof. Our criminal justice system gives prosecutors a number of tools, such as conducting wiretaps, obtaining search warrants, and immunizing or making deals with witnesses who face criminal liability, to which defense lawyers lack access. Why shouldn't we treat investigative deceit like these other devices and make it available only to the prosecution?

One might well draw precisely the opposite conclusion, however, from the fact that prosecutors have exclusive use of so many investigative tools not available to defense counsel. Because the defense lacks access to tools such as wiretaps and immunity, it can be argued that the defense has a greater need than the prosecution for access to investigative deception. Defense counsel lacks these alternatives to investigative deceit in dealing with recalcitrant witnesses.

D. Encouraging and Enabling Effective Assistance

The need for more thorough defense investigation and greater defense access to resources to support investigation has become a mantra of those who seek to improve the quality of defense representation in the United States.[63] DNA evidence in recent decades has revealed numerous wrongful convictions, and analysis of these has disclosed a number of contributing factors.[64] One of these factors is lack of effective assistance of counsel and, in particular, lack of competent and thorough defense investigation.[65]

The fact that many defense lawyers regularly under-investigate cases due to lack of time, resources, or inclination suggests that putting a valuable investigative tool such as undercover investigation ethically out of bounds for defense lawyers is unwise. If anything, it supports increasing the investigative options available to the defense and encouraging use of these options.

Several defense lawyers with whom I spoke during a series of discussions around the country sponsored by the ABA Criminal Justice

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63. *See generally* Adele Bernhard, *Take Courage: What the Courts Can Do to Improve the Delivery of Criminal Defense Services*, 63 U. Pitt. L. Rev. 293 (2002); Paul C. Giannelli, Ake v. Oklahoma*: The Right to Expert Assistance in a Post-*Daubert*, Post-DNA World*, 89 Cornell L. Rev. 1305 (2004); Rodney Uphoff, *Convicting the Innocent: Aberration or Systemic Problem?*, 2006 Wis. L. Rev. 739.

64. *See The Causes of Wrongful Conviction*, The Innocence Project, http://www.innocenceproject.org/understand/ (last visited May 23, 2011).

65. *See, e.g.*, Bernhard, *supra* note 63, at 294; Giannelli, *supra* note 63, at 1356–58; Uphoff, *supra* note 63, at 744–64; *Bad Lawyering*, The Innocence Project, http://www.innocenceproject.org/understand/Bad-Lawyering.php (last visited May 23, 2011).

Section in the fall of 2010 complained that police, prosecutors, and judges criticize defense counsel when they pursue even nondeceptive investigative techniques, such as having defense investigators interview witnesses. One recounted an instance in which a defense lawyer was arrested for simply interviewing the complaining witness in a domestic violence case. But these lawyers, while agreeing that defense counsel were often unfairly subject to criticism when they pursued legitimate investigative methods, divided on whether defense lawyers should be given an ethical green light to use investigative deceit. Some felt that approving the use of such deceit is an important step in sending a message to police, prosecutors, judges, and defense lawyers that defense counsel have an obligation and a right to investigate the facts of a case, rather than relying solely on what the prosecution hands over during discovery. But other defense lawyers felt that approving defense use of deceit would augment the chances that defense investigations would be criticized and viewed with suspicion. Some also felt that the reality of such criticism, which they believed was unlikely to change, makes many defense lawyers wary of using investigative deceit and, thus, the proposed advantages to the defense would ultimately prove illusory.

E. Psychological Realism

A former prosecutor who favors a symmetrical approach of allowing both the prosecution and the defense to use investigative deceit made an interesting argument based on that prosecutor's experience with the generation and disclosure of exculpatory evidence, often referred to as "*Brady* material." This former prosecutor pointed out the questionable psychological assumptions underlying the current de facto approach of unilaterally exempting only prosecutors from the ethical proscriptions on misstatement and deceit in investigations. The current system gives primary responsibility for developing the evidence in a case—both inculpatory and exculpatory—to the police and prosecution. This lawyer's experience had been that police and prosecutors often do a poor job of uncovering and disclosing exculpatory evidence, because they lack sufficient incentive to do so and are hampered by an array of psychological barriers such as "tunnel vision" and nonrational escalation of commitment.[66] This former prosecutor preferred giving the defense a greater arsenal of investigative tools and resources, including the ability to conduct its own undercover investigations in appropriate cases, because the defense has greater incentive to generate *Brady* material and encounters fewer psychological challenges in seeking out and recognizing such evidence.

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66. *See generally* Alafair Burke, Commentary, Brady*'s Brainteaser: The Accidental Prosecutor and Cognitive Bias*, 57 Case. W. Res. L. Rev. 575 (2007).

F. Encouraging Legal Supervision of Investigations

A common and persuasive argument encountered in discussing this subject with prosecutors and former prosecutors is grounded on the value of encouraging prosecutorial involvement in and legal supervision of police investigations. If participation in and supervision of police undercover investigations were made unethical, this argument goes, it would not end such investigations; it would simply discourage police from seeking prosecutorial involvement and advice during the investigative phase of a criminal case. It would also discourage prosecutors from taking on and encouraging such supervision. Ethical limits on prosecutorial participation in investigative deceit would tempt the police to wait until after the investigation was over to bring their results to the prosecutor, in order to avoid putting the prosecutor in an awkward position. No one I talked to, whether prosecutor, defense lawyer, or judge, thought that less prosecutorial supervision of police is a good idea.

Again, one can make the same argument about discouraging lawyer supervision of defense investigations. If defense lawyer participation in investigative deceit is deemed unethical, it will tempt defense investigators and savvy clients to conduct investigations without consulting or informing defense counsel. When applied to defense counsel, this argument may carry less weight than it does when applied to prosecutors, since defense investigators who are hired and paid by defense counsel may be viewed as less likely to act without consulting defense counsel. Additionally, any loss of legal supervision on the defense side may appear less ominous than a similar loss of supervision of police.

G. Image of the Profession

A widely shared concern about allowing lawyers to advise and supervise investigative deception is a potentially negative impact on the image of the legal profession and the criminal justice system. Here one may draw a distinction between prosecutorial and defense counsel participation in deceit. Negative public response to government investigative deceit seems less likely today than it once did. It is, after all, sympathetically portrayed in countless movies, television programs, and novels. Is public response likely to be negative to defense, as opposed to prosecutorial, supervision of investigative deceit? If such deception helps to reveal truth and to decrease the number of convictions of the innocent, the public response to such deceit might well be positive.

H. A Slippery Slope

Another argument against allowing investigative deception is that once lying is allowed, it will be hard to set and enforce boundaries on it. If defense lawyers, for example, are allowed to use deception in the

investigative phase of a criminal case because it is useful and necessary in revealing truth, then why not allow lawyers to use deception inside the courtroom based on the same rationales?

CONCLUSION

What about the American Bar Association's Criminal Justice Standards? After all, the Criminal Justice Standards and proposed changes to them are the focal point of this issue. They prompted the roundtable discussions that gave me the opportunity to hear the views of many prosecutors, defense counsel, and judges on investigative deceit and gave rise to the writing of this Essay. What do the Standards say about investigative deceit? What should they say?

The current Standards as well as the proposed changes to them do not explicitly address investigative deceit. That is why this Essay focuses on the drafting and interpretation of state ethics rules modeled on the Model Rules of Professional Conduct. These state ethics rules, as well as opinions interpreting them, rather than the Standards, have provided the focal point for recent discussion, controversy, and change regarding investigative deceit.

The primary goal of the Standards is to express consensus among prosecutors, defense counsel and judges on important criminal justice issues. While there appears to be little current controversy about prosecutors supervising investigative deceit, the same cannot be said about defense use of investigative deceit. The roundtable discussions described in this Essay indicated that attitudes about defense use of investigative deceit are still divided, even among defense counsel. Recent changes in the ethics rules of states such as Wisconsin and Oregon indicate that these attitudes are also in a period of transition. The consensus that ideally underlies an ABA Criminal Justice Standard, then, simply does not currently exist regarding defense use of investigative deceit.

Will consensus about defense use of investigative deceit ever exist? The answer to that question will depend on how jurisdictions across the United States react in coming years to the trend of acceptance of such deceit emerging from jurisdictions such as Wisconsin and Oregon.